

**Laborers' District Council of West Virginia and Michel, Inc., Employer/Charging Party and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local No. 152, Party-to-the Dispute.** Case 6-CD-916

June 30, 1998

## DECISION AND DETERMINATION OF DISPUTE

BY GOULD AND MEMBERS FOX AND HURTGEN

The charge in this Section 10(k) proceeding was filed July 22, 1997, by Michel, Inc. (the Employer), alleging that the Respondent, Laborers' District Council of West Virginia affiliated with Laborers' International Union of North America, AFL-CIO (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to the employees represented by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local No. 152 (Plumbers). The hearing was held on August 13, 1997, before Hearing Officer Stephanie Brown. Thereafter, the Employer, Laborers, and Plumbers filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

### I. JURISDICTION

Michel, Inc., is a West Virginia corporation doing business as a general contractor engaged in heavy construction with its place of business in Bridgeport, West Virginia. During the 12 months preceding the hearing, Michel had gross revenues in excess of \$50,000, and during the same period it purchased and received materials directly from enterprises located outside the State of West Virginia in excess of \$50,000. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Laborers and Plumbers are labor organizations within the meaning of Section 2(5) of the Act.

### II. THE DISPUTE

#### A. Background and Facts of Dispute

The current dispute involves the Employer's contract with the Sanitary Board of the City of Clarksburg, West Virginia, to perform part of the city's waste

water treatment plant's major renovation and expansion. The Employer began its work in January 1997 and that work is projected to be completed by May 1998.

At the Waste Water Treatment project, the Employer has used approximately 80 of its own employees to perform 99 percent of all the work. Thirty of the eighty employees are laborers, and they are primarily engaged in preparing the ditch beds, laying and installing the pipes, and other related work.

On July 9, 1997, the Plumbers wrote a letter to the Employer stating that it intended to file a grievance against the Employer because the Employer had assigned the piping work on the project to Laborers in violation of the Plumbers' contract with the Employer.

Thereafter, on July 11, 1997, by letter, the Employer informed the Laborers about the grievance filed by the Plumbers and that in order to settle the grievance, it was going to assign the piping work to plumbers. On July 14, by letter and telephone, the Laborers responded by stating that the employees it represented were entitled to perform the piping work under the Heavy Agreement and that they would "take all reasonable actions against your company, including picketing and withholding of our services . . . unless the work remained with the Laborers." The Employer continued its assignment of the work to its employees represented by the Laborers.

#### B. Work in Dispute

The disputed work, as stipulated by the parties, involves:

All piping and related work at the Clarksburg Waste Water Treatment Plant including but not limited to transporting, setting, installing and trench backfilling of all ductile iron pipe and related piping but excluding domestic plumbing consisting of potable water systems and drainage systems within the Chlorination building customarily constructed under building trades conditions.<sup>1</sup>

#### C. Contentions of the Parties

The Employer and Laborers contend that a jurisdictional dispute exists, relying on claims to the work made by both Unions, and the Laborers' threat to picket and to withhold services. The Employer and the Laborers claim the work in dispute is covered by their current collective-bargaining agreement and that the Employer is contractually obligated to assign the work

<sup>1</sup> Notwithstanding this stipulation regarding the scope of the disputed work, which remains in effect, the Plumbers have also taken the position that employees represented by the Laborers have been appropriately assigned aspects of the disputed work, such as the excavation work and the trenching work. The Plumbers continue to seek what it describes as the piping work.

in dispute to employees represented by the Laborers. The Employer and the Laborers assert that an award in favor of employees represented by the Laborers is justified by the Laborers' collective-bargaining agreement, employer preference and past practice, skills and safety, area and industry practice and efficiency and economy. The Employer further contends that the wage certification incorporated into the bid documents shows that the West Virginia Division of Labor certified the work to come within the Heavy Agreement wage rate requirements. The Plumbers contend that because it has merely filed a grievance, there is no Section 10(k) dispute and that the matter should be dismissed.

#### D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute under Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) that the parties have not agreed on a method for the voluntary adjustment of the dispute.

Initially, we find that there are competing claims for the work. The Laborers has at all times claimed the work in dispute and, by letter dated July 14, 1997, threatened to take economic action including picketing against the Employer if the work was reassigned to plumbers. The Plumbers has also made a claim for the work in dispute by filing a grievance with wording that seeks reassignment of part of the disputed work and by stipulating on the record a claim to the work in dispute.<sup>2</sup>

Finally, the Employer, Laborers, and Plumbers stipulated at the hearing that there was no agreed-upon method for voluntary adjustment of the work in dispute.

In a 10(k) proceeding the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding a violation. Thus, we find that the Laborers' July 14 letter constitutes a threat of economic action if the work in dispute were reassigned to the Plumbers. Under the circumstances, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. We also find that

there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination. Therefore, we find no merit in the Plumbers' argument that this matter should be dismissed.

#### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962).

The following factors are relevant in making the determination of dispute.

##### 1. Certification and collective-bargaining agreements

There is no evidence that either Union has been certified to represent employees performing the disputed work. Both Unions assert, however, that their collective-bargaining agreements entitle them to the disputed work.

The Employer and Laborers are parties to the 1997-1999 West Virginia Highway/Heavy Agreement between the Highway/Heavy Contractors Association Division of the West Virginia Construction Council and its Affiliated Associations, and five other labor organizations. This agreement covers construction, modification, additions, repairs, and/or improvements to, inter alia, sewage disposal and water treatment plants. The work classifications for laborers include, inter alia, pipe layer (including laser beam set up) and pipe layer helper.

The Employer and the Plumbers are also parties to a collective-bargaining agreement effective from 1996 to 1999. This agreement describes their work jurisdiction as covering, inter alia, the installation of piping and all piping materials by any method and all other work included in the trade Jurisdiction Claims of the Plumbers and Steamfitters.<sup>3</sup> However, it does not make a specific reference to the laying of heavy ductile pipe and the related work of trenching, backfilling, and compacting. Nevertheless, the record reflects that em-

<sup>2</sup> Contrary to the Plumbers' contention, we find the Board's decision in *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), to be distinguishable. In *Capitol Drilling*, the Board held that a union's action through a grievance procedure to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause does not, without more, constitute a claim to the subcontractor for the work. The Board quashed the 10(k) hearing, noting that the union which had filed the grievance had never engaged in any dispute with the subcontractor. Here, there is no subcontractor involved and both the Plumbers and the Laborers have made competing claims to the Employer for the work.

Member Hurtgen does not pass on the validity of *Capitol Drilling*.

<sup>3</sup> Art. XXIX of this agreement, "Work Descriptions" describes the many different types of work to be done by the Plumbers, including: "all piping in connection with central distributing filtration treatment stations, boosting stations, waste and sewage disposal plants, central Chlorination and chemical treatment work and all underground supply lines to cooling wells, suction basins, filter basins, setting basins and aeration basins."

ployees represented by both Unions have performed various aspects of the work in dispute in varying degrees under their union contracts. Based on the evidence presented, we find that this factor does not favor awarding the work in dispute to either group of employees.

## 2. Employer preference and past practice

The Employer began performing the type of work in dispute in 1995 when it was awarded a similar contract from the city of Bridgeport, which is only a few miles from Clarksburg. The Employer used employees represented by the Laborers for that contract and has continued to use laborers to perform all piping work on its projects. The Employer's president and CEO, Thomas H. Michel, testified that the Employer prefers to use Laborer-represented employees because they are better trained and qualified to perform all the related work involved in completing the project rather than just simply connecting the pipes. The Employer also notes that it considered the practices of its competitors who have used laborers for many years to perform the same work. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by the Laborers.

## 3. Relative skills and safety

The record shows that the laborers have historically performed excavation work and that, because much of the Employer's work involves working subsurface, they perform this type of work for the Employer on a daily basis. The Employer noted that the laborers have been specifically trained for this type of work and that the laborers utilize the OSHA safety standards for the identification of soil conditions and other hazards necessary for the safe excavation, trenching, and laying of heavy ductile pipe. The Employer's testimony also noted the laborers' excellent safety record in the use of power and manual handtools, all compaction equipment including vibratory rollers, concrete vibrators, chop saws, cutting torches, and laser leveling equipment. The Plumbers offered a single witness who testified briefly about safety training, but it did not offer detailed evidence comparable to that adduced by the Laborers and its submission to the Board contains no claims concerning safety records or training.

Accordingly, we find that on this record, this factor favors an award of the work in dispute to employees represented by the Laborers.

## 4. Area practice

The record shows that the Employer-members of the Highway/Heavy Contractors Association Division of the West Virginia Construction Council regularly use Laborers-represented employees to perform their heavy duty piping work. The record also shows a concession

by the Plumbers that the Laborer represented employees have been utilized for the pipelaying/fitting work in dispute at other water treatment plants in West Virginia with more frequency than the Plumbers. Accordingly, we find that this factor favors an award of the work in dispute to employees represented by the Laborers.

## 5. Economy and efficiency of operations

As noted above, laborers have performed not only the pipelaying work but all of the other related work that includes digging, grading, compacting, lagging, shoring, and backfilling. Michel testified that because the Laborers-represented employees can perform all of the work in dispute there is no downtime which would occur if the Employer were required to use Plumbers-represented employees for intermittently required work. According to Michel, the plumbers are qualified to perform only one aspect of the work and they would spend 95 percent of their worktime watching laborers perform all of the other related work. Further, the Employer contends that the Laborers' contract also allows the Employer to maintain a core group of Laborers-represented employees, thereby maximizing its efficiency, productivity, and safety from job to job. Finally the Employer states that, unlike plumbers, laborers are not adverse to working in inclement weather conditions, which is often necessary. Based on the evidence presented, we find the factor of economy and efficiency favors an award of the work in dispute to employees represented by the Laborers.

## Conclusion

After considering all the relevant factors, we conclude that employees represented by Laborers District Council of West Virginia are entitled to perform the work in dispute. We reach this conclusion relying on the factors of Employer preference and past practice, relative skills and safety, area practice, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by the Laborers District Council of West Virginia, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

## DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Michel, Inc. represented by Laborers District Council of West Virginia are entitled to perform all piping and related work at the Clarksburg Waste Water Treatment Plant in Clarksburg, West Virginia.